IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

ARNOLD A. MORSE, SR.,
and
HELLEN V. MORSE,

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	8
APPENDIX A - Decision of the United States Court of Claim	A-1
APPENDIX B - Order of the U.S. Court of Claims, filed October 15, 1971	B-1
APPENDIX C - Constitutional Provisions and Statutes Involved	C-1

AUTHORITIES CITED

Cases:

Acron Invest. Co. v. Fed. S & L Ins. Corp.
363 F.2d 236 (9th Cir. 1966) 6

Bell v. C.I.R.
278 F.2d 100 (4th Cir. 1960) 6

Broad River Power Co. v. Query,
288 U.S. 178, 180 (1933) 5

Page

Buckstaff Bath House v. McKinley
308 U.S. 358 (1939) 5

C.I.R. v. Korell
339 U.S. 619 (1950) 7

C.I.R. v. Mooneyhan
404 F.2d 522 (6th Cir. 1968) 6

C.I.R. v. Wolfe
361 F.2d 62 (D.C. Cir. 1966), Cert. den.
385 U.S. 838 6

Donahue v. Fuller
104 F. Supp. 145 (D.C., R.I. 1952) 6

Donaldson v. C.I.R.
51 T.C. 830 (1969) 7

James v. Dravo
302 U.S. 134, 149 (1937) 5

Kam Koon Wan et al v. Black
188 F.2d 558 (9th Cir. 1951) 6

Lassiter v. Atkinson
176 F.2d 984 (9th Cir. 1949) 6

Lewyt Corp. v. C.I.R.
349 U.S. 237 (1955) 7

Meyer v. N.L.R.B.
429 F.2d 697, 701 (10th Cir. 1970) 6

United Packinghouse Workers v. Mauer-Neuer
272 F.2d 647 (10th Cir. 1959) 6

United States v. Merriam
263 U.S. 179 (1923) 7

Page

Statutes:

22 U.S.C. 802(4) 3, 5

26 U.S.C. 911(a)(2) 2, 3, 5

28 U.S.C. 1255(1) 2

28 U.S.C. 1491 3

Other Authorities:

Constitution of the United States:

Fifth Amendment 3

73 C.J.S. Pub. Adm. Bod. and Proced. Sec. 6 & 8 6

Restatement of the Law of Agency 2d, Vol. 1. Sec. 1 6

Rev. Rul. 55-384, 1955-1 C.B. 94 7

Rev. Rul. 60-36, 1960-1 C.B. 279 7

Rev. Rul. 69-448, I.R.B. 1969-34 7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered on June 11, 1971.

OPINION BELOW

The opinion of the United States Court of Claims, denying petitioners' motion for summary judgment and dismissing their petition to that Court, is printed in Appendix A hereto and is not yet reproduced in the official reports.

JURISDICTION

The judgment of the United States Court of Claims, printed in Appendix A hereto, was entered on June 11, 1971. Timely Motion For Rehearing was filed and was denied on October 15, 1971. This Court has jurisdiction under 28 U.S.C. Sec. 1255 (1).

QUESTIONS PRESENTED

1. Whether a voluntary association of cooperative consumer patrons located in a foreign country and made up of American citizens and foreign nationals and their dependents, some of whom are employees of the Foreign Service or members of the military services, while others are civilian employees of private contracting firms or exempt agencies performing services for the U.S. Government, who have provided all of their own working capital; acquired and own all of the Association's assets (except for the bare land space); who exercise full control over all aspects of the business and are completely self-sufficient; which association and personnel receive none of the benefits of Government affiliation or employment; and which association is officially designated as "non-Government operated" and whose contracts identify it as "an independent organization doing business in Tehran, Iran," is an "agency" of the United States Government within the intent of Section 911 (a)(2), Internal Revenue Code of 1954?

2. Whether the Court below applied inapplicable judicial precedent and erroneously relied on the layman's dictionary definition of the term "agency" to deprive petitioners of property without due process of law?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved is the due process clause of the fifth amendment to the United States Constitution. The statutes concerned are portions of the Internal Revenue Code of 1954, identified as 26 U.S.C. 911 (a)(2), and the Foreign Service Act of 1946, c. 957, 60 Stat. 999, applicable portions of which have been reproduced and added in the Appendix.

STATEMENT OF THE CASE

This is an action brought in the United State Court of Claims by the petitioners[1] for refund of personal income taxes, paid under protest, for the year 1966 in the amount of $2,287.67, plus interest. The jurisdiction of the case was based on the provisions of 28 U.S.C. 1491.

Petitioner was a wage-earner under an individual contract of employment, dated 30 August 1965, for a 24 month period, terminable by either party on a 60 day written notice, and renewable at the expiration of the term by mutual agreement of the parties. The employer was the United States Employees' Association, Tehran, Iran,[2] "an independent organization doing business in Tehran, Iran." Petitioner was employed as the assistant general manager of the Association with duty in Tehran.

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[1] Hellen V. Morse is a joint petitioner only because she executed the joint tax return with her husband. She was not employed and had no earned income during the taxable year.

[2] Hereinafter referred to as the "Association."

The Association, a voluntary organization of American citizens and designated foreign nationals, all of whom enjoy duty-free import privileges from the Government of Iran, is an association of cooperative consumer-patrons who have joined collectively in the organization, operation and management of a strictly commercial business enterprise providing commissary, mess services and recreational facilities for its members in a foreign environment.

The membership of the Association, on an equal basis, have contributed all of their own working capital, refundable on termination of membership; acquired and own all of the Association's assets, including stock, inventory, fixtures, equipment and building facilities (except for the bare land space on which it has constructed its own structures at a cost to the Association in excess of $150,000.00 and which structures will become a permanent part of the property in exchange for not paying any rent for use of the land); made its own capital improvements; recruited and engaged its own personnel, i.e., management, supervisory and working-level staff; admittedly sets its own policies, prices, wages and working conditions; provides their own finances, bonding, insurance, accounting and banking arrangements; pays for all transportation charges on incoming shipments of wares, as well as for the personal transporation of its employees, at regular commercial rates with private carriers, since it is not entitled to use Government transportation; services its privately-owned motor vehicles at commercially-owned Iranian service stations where all gasoline is taxed, since again, it is not a Government agency entitled to use the Embassy Motor Pool and assumed full financial liability for all contractual obligations, indebtednesses, defaults, losses, and operating expenditures of the activities of the Association.

The United States Government has expressly disclaimed any liability for the obligations of the commissary, mess and recreational activities to third parties or local governments and directed Government personnel, when acting as representatives of the Association, to avoid the implication of responsibility for Association obligations. No full-time employee of the Association is a paid employee or officer of any agency or executive department of the United States Government.

The Association enacts its own Constitution and Bylaws under very general standards and guidelines; it executes and controls the administration of its policies through (a) Membership meetings, (b) The Board of Directors, (c) Special Committees, and (d) The General Manager of the Association and other employees, subject only to review of the Ambassador.

REASONS FOR GRANTING THE WRIT

1. The Court Below Decided a Federal Question of Substance in a Way Probably Not in Accord with Applicable Decisions of this Court, other Federal Courts, the Statute and recognized Authorities.

In holding that petitioners' employer was an "agency" of the Government within the meaning of Section 911, the Court of Claims has given that term an unusually broad interpretation and one which is contrary to the definition in the statute,[3] decisions of this Court,[4] as

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[3] See: 22 U.S.C. 802 (4).

[4] See: *Buckstaff Bath House v. McKinley*, 308 U.S. 358 (1939); *James v. Dravo*, 302 U.S. 134, 149 (1937); and *Broad River Power Co. v. Query*, 288 U.S. 178, 180 (1933).

well as decisions of other federal courts[5] and recognized authorities,[6] and seriously raises the question of what is and what is not an "agency" of the Government.

Using the criteria of the court below, any kind of an independent, self-functioning organization, completely self-sufficient and providing all of its own capital-investment, management, expertise and resources, operating permissively with only the barest of guidelines and review and with the Government's express renunciation of responsibility and specific disclaimer of financial and official liability for any of its activities, becomes an "agency" of the Government.[7]

2. The Question is of Importance in the Administration of The Federal Tax Laws.

Settlement of this question is in the public interest, for petitioners' case is representative of a problem confronting many taxpayers, most of whom are in the lower tax brackets who can ill afford the costs of litigation.

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[5] See: *Lassiter v. Atkinson*, 176 F.2d 984 (9th Cir. 1949); *Kam Koon Wan, et al v. Black*, 188 F.2d 558 (9th Cir. 1951); *Donahue v. Fuller*, 104 F Supp. 145 (D.C.R.I. 1952); *United Packinghouse Workers v. Mauer-Neuer*, 272 F.2d 647 (10th Cir. 1959); *Bell v. C.I.R.*, 278 F.2d 100 (4th Cir. 1960); *Acron Investment Co. v. Federal Savings and Loan Insurance Corp.* 363 F.2d 236 (9th Cir. 1966); *Meyer v. N.L.R.B.*, 429 F.2d 697, 701 (10 Cir. 1970).

[6] See: 73 C.J.S. Public Administrative Bodies and Procedure, sections 6 and 8; and Restatement of the Law of Agency 2d, Vol. 1, Sec. 1.

[7] Compare: *C.I.R. v. Wolfe*, 361 F.2d 62 (D.C. Cir. 1966), Cert. den. 385 U.S. 838, and *C.I.R. v. Mooneyhan*, 404 F.2d 522 (6th Cir. 1968).

Failing to review the decision of the court below creates inequity of treatment and rank discrimination among many similarly-situated tax-payers and results in chaos in the definition of the term "agency" of the Government.[8]

The decision of the court below misapplies precedent from a Tax Court judgment[9] wherein the claimant prosecuted the cause *pro se* and which decision was not reviewed on appeal leaving issues in dispute which should be finally determined by this Court.

3. The Decision of the Court Below Conflicts Not Only with the Definition of the Statute, Other Determinations by the Commissioner of Internal Revenue, Decisions of Federal Courts and the Authorities, but also with Applicable Decisions of this Court.

This Court's decisions make it plain that in dealing with a tax statute, it is not the business of the judiciary to restrict the application of the legislative text when Congress failed to do so. See: *Lewyt Corp. v. C.I.R.*, 349 U.S. 237 (1955); *C.I.R. v. Korell*, 339 U.S. 619 (1950); *U.S. v. Merriam*, 263 U.S. 179 (1923).

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[8] See, for example: Rev. Rul 55-384, 1955-1 C.B. 94; Rev. Rul. 60-36, 1960-1 C.B. 279; and Rev. Rul. 69-448, I.R.B. 1969-34.

[9] See: Donaldson v. C.I.R. 51 T.C. 830 (1969).

CONCLUSION

To preclude continuous conflict and discrimination in the application of federal tax law and to establish a uniform definition of the term "agency of the Government of the United States," it is respectfully submitted that this petition for review should be granted and the issue determined with finality by this Court.

Respectfully submitted,

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APPENDIX A

In the United States Court of Claims

No. 357-69

(Decided June 11, 1971)

ARNOLD A. MORSE, SR., AND HELLEN V. MORSE,
v. THE UNITED STATES

Carl J. Felth, attorney of record for plaintiff.
Robert N. Darosis, with whom was *Assistant Attorney General Johnnie M. Walters*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

ON PLAINTIFFS' MOTION AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT, AND DEFENDANT'S MOTION FOR JUDGMENT ON ITS COUNTERCLAIM

NICHOLS, *Judge*, delivered the opinion of the court:

Petitioners say they are American citizens, husband and wife, suing as joint taxpayers for refund of income tax paid for the year 1966, in the amount of $2,287.67. Mrs. Morse, who had no income of her own, is joining in this action solely because of her participation in the joint return. Reference hereinafter to "plaintiff" is intended to mean Mr. Morse only.

Plaintiff filed with the Commissioner of Internal Revenue a timely claim for refund of $1,533.38, withheld from his salary. The Commissioner denied the claim for refund and assessed a deficiency of $754.29 with interest of $42.97. Plaintiff paid the deficiency but refused to pay the interest. The case is now before us on plaintiff's motion for summary

judgment and on defendant's cross motion and counterclaim for the $42.97 interest. Plaintiff does not dispute the amount of the interest and offers no reason why, if he owes the tax deficiency, the interest was not lawfully assessed.

The basis for plaintiff's claim is § 911(a)(2), Internal Revenue Code of 1954, which reads as follows:

> (a) General rule. The following items shall not be included in gross income and shall be exempt from taxation under this subtitle:
>
> * * * * * *
>
> (2) Presence in foreign country for 17 months. In the case of an individual citizen of the United States who during any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days in such period, amounts received from sources without the United States (*except amounts paid by the United States or any agency thereof*) which constitute earned income attributable to services performed during such 18-month period. * * * (Emphasis supplied).

We think there is no triable issue of fact. The sole question for determination is whether Mr. Morse's employer, the United States Employees Association of Tehran, Iran, is an "agency" of the United States Government within the meaning of § 911, *supra*. We hold on reason and authority that the Association is an agency of the Government and that plaintiff is not entitled to exclude any salary payments from his gross income.

Plaintiff was hired to serve as assistant general manager of the Association, which the American Embassy employees organized "to provide for its members and their dependents recreational activities and a source of food and other items at minimum prices that are consistent with good service and efficient management." Article I, Constitution of the Association. The terms of his employment were specified in a contract which he entered with the Board of Directors of the Association. The contract provided for a fixed term of employment of 24 months, renewable, and with the proviso that either party could terminate upon sixty days written notice. The Association defrayed the cost of transporting plaintiff and his family from their Florida home to Tehran. He did not enjoy the benefits afforded by law to civil service employ-

ces, although the Association did agree to contribute up to $150 per year towards a private health plan. The right was reserved to cancel the contract should plaintiff be unable to perform his work due to physical disability lasting for 30 days. There were no appropriated funds available for his salary and it is to be assumed that he was to be paid from the available funds of the enterprise.

It is clear that plaintiff was in no sense a Government employee. However, the exception in § 911(a)(2) does not require that there be any employment relationship with the Government, nor is there a requirement that amounts so paid must be out of Treasury funds. It may be paid by an "agency." While this term, so familiar to Washingtonians, may have varied meanings according to context; Webster's *Unabridged Dictionary* (3d Ed. 1968), assigns as one meaning: "a person or thing through which power is exerted or an end is achieved: *Instrumentality*." We think that is the meaning Congress intended here. As the Tax Court said in *Cecil A. Donaldson*, 51 T.C. 830, 836 (1969):

> * * *. Although the legislative history of the exception refers specifically only to salaries of military personnel, ambassadors, and consular officials paid directly by the United States, the scope of the exception is broader; otherwise, the phrase "or any agency thereof" is surplusage. See *Kirchbaum v. United States*, 138 F. Supp. 515, 519-523 (E.D. Tenn. 1956), for an extensive review of the pertinent legislative history.

The court had in mind, we are sure, that employees of "agencies" in the narrow sense are paid by the Government, and if they are the only ones covered, the addition of the phrase "or any agency thereof" serves no purpose. In *Donaldson*, the plaintiff was employed as assistant manager of the American Embassy Cooperative Commissary in Karachi, Pakistan, and his pay was held derived from such an "agency." The Commissary there, and the Association in the instant case, were both established under authority of State Department Regulations published in section 500, Volume 6, Foreign Affairs Manual, and issued pursuant to section 921(b) of the Foreign Service Act of 1946, as amended, 22 U.S.C. § 1139(b) (1964). Section 921(b) authorizes the Secretary of State to prescribe regulations for the "establish-

ment, maintenance, and operation by officers and employees of the Service, of non-Government operated commissary and mess services and recreation facilities at posts abroad." The Tax Court found that the congressional purpose in providing this authority was "to assist in alleviating adverse conditions abroad which might detract from the efficiency of the foreign service." 51 T.C. at 837. From this purpose and the controls exercised over the Commissary by the Ambassador, the court concluded at 840–41:

> * * * the commissary was an agency of the United States. It was engaged in governmental rather than commercial functions, since its sole purpose was to contribute to the efficiency and convenience of the personnel of Government organizations with missions in Pakistan. It had no commercial objective, in that profits derived from its operations were used to reduce the sales price of items handled by the commissary. The Ambassador could order its dissolution at any time and, upon dissolution, its assets could be distributed only with the approval of the Ambassador. Policy, as well as management direction, was vested in the Ambassador, his staff, and the staffs of the various missions in Pakistan. * * *

Plaintiff attempts to distinguish this persuasive decision by what he terms "the voice of the membership of the Association in the instant case vis-a-vis the absence of such control over the management by the membership in the Donaldson case." He contends that this case is more like *Brummitt* v. *United States*, 165 Ct. Cl. 78, 329 F. 2d 966 (1964), where this court held that an officers' mess in Taipei was not a non-appropriated fund activity as defined in Army Regulations and therefore not an agency of the Government under § 911. It was a private club formed by its members for their own purposes, on their own initiative. During the taxable year neither the Army nor the members considered the club to be governed by Army Regulations, there was no official review or audit of either policy or operations, and membership was unrestricted. There are other characteristics which distinguish *Brummitt* from *Donaldson*, but we think those mentioned are the most significant. We find the facts of the instant case like *Donaldson* rather than *Brummitt*, and since we think the former case was soundly reasoned and correctly decided, we think it should be followed here rather than *Brummitt*.

The Internal Revenue Service reached a similar conclusion in a ruling which antedated plaintiff's employment. Rev. Rul. 64–255, 1964–2, C.B. 189 provides:

> The activities of commissaries established and operated abroad by employees of the Department of State under the provisions of the Foreign Service Act of 1946, section 921(b), and regulated by the Foreign Service Manual promulgated thereunder, are activities performed on United States Government property in accordance with official regulations or instructions for the promotion of the government's interest. These commissaries are considered an arm of a department of the United States Government, and agencies or instrumentalities of the United States. See Rev. Rul. 54–612, C.B. 1954–2, 169. Therefore, the compensation of employees of the commissaries does not qualify for the exemption from Federal income tax afforded by section 911(a) of the Internal Revenue Code of 1954.

Plaintiff refers to other Revenue Rulings he says are inconsistent. We think it unnecessary to go into this because we would arrive at the same conclusion had no Revenue Ruling been issued on the State Department organizations here involved.

The court in *Donaldson* relied in part on the Supreme Court's opinion in *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942), where it was held that military post exchanges were "arms of the Government" and therefore sales to them were not subject to a state sales tax which on its face did not apply to sales to "the Government of the United States or any department thereof." Post exchanges are non-appropriated fund activities, the Government assuming none of the financial obligations thereof; nevertheless, the Court stated at 484–85, that:

> The commanding officer of an Army Post, subject to the regulations and the commands of his own superior officers, has complete authority to establish and maintain an exchange. * * *. The object of the exchanges is to provide convenient and reliable sources where soldiers can obtain their ordinary needs at the lowest possible prices. * * * government officers, under government regulations, handle and are responsible for all funds * * *. Profits, if any, do not go to individuals. They are used to improve the soldiers' mess, to provide various

types of recreation, and in general to add to the pleasure and comfort of the troops.

The elements of control, with power to initiate and terminate, with effectuation of Government purposes paramount over those of organizers and members, the exclusion of private profit, and the limitation of membership to Government-connected persons, serve to identify an "agency." This excludes such institutions as national banks having overseas branches, which, although chartered by the Government and regulated thereby, exist to earn a profit by serving the needs of the public generally. Plaintiff would have to show that the Association was "not established to provide essential morale and recreational facilities and services for personnel of an installation." *See, Frank E. Raffensperger*, 33 T.C. 1097, 1106 (1960).

The plaintiff alleges that his employer was "an association of cooperative consumer-patrons" who have "voluntarily joined together" to conduct a "strictly commercial business enterprise." He says that the "control and supervision exercised by the United States, through the Ambassador and his designee, is nominal and largely that exercised over any privately-owned business, operated by Americans, in a foreign land." In short, he tries to show that the Association is not governed by the State Department Regulations, *supra*. He does not deny the authenticity of the Regulations, and if they contemplate more control than plaintiff's affidavits show was exerted in fact, we think it would be the Regulations that would govern in deciding whether the Association was, for the United States Government, a means by which an end was achieved. Thus the plaintiff does not tender a triable fact issue.

These Regulations provide extensive general standards for the operation of "non-Government operated commissary mess services and recreational facilities abroad." They provide initially that "all" such facilities "shall" be operated under these general standards and criteria. The principal officer at each post, here the Ambassador, is given the responsibility for making the initial determination of the need for and feasibility of establishing a facility. The Regulations specifically prohibit the establishment of any in localities where

another United States agency operates similar facilities. Whenever feasible, they must be located on United States Government-held property; if that is not possible "an inconspicuous place should be selected." The principal officer is given authority to provide "necessary supplies, equipment, utilities and space in properties owned or leased by the United States Government." The Association here occupied rent-free quarters on the embassy compound. Appropriated funds "will" be made available "when required" to help establish new facilities. In the instant case, membership subscription fees furnished the initial working capital. The principal officer has the responsibility for "monitoring the activities of commissary and recreation associations to assure that the operations of such activities are conducted in a prudent manner in accordance with the policies of the Department and regulations prescribed herein."

It is clearly pointed out that the Government will not be responsible for any obligations of employee associations, but at the same time, certain minimum fiscal control measures are set forth. These are requirements for employee bonding, adequate insurance, independent audit and inventory, and the requirement that the principal officer be furnished a monthly statement of operations and balance sheet.

All profits "will be used for welfare and recreational activities." The constitution of the Tehran Association provides that profits will be "kept at a minimum consistent with efficient operation and sound financial management." Upon liquidation, any surplus "should be regarded as available for redistribution to facilities at other posts requiring financial assistance."

These Regulations make it plain that the Ambassador's control of the Association was more than "nominal." Indeed, we think the Ambassador's right to control these activities of his employees exists independent of the Regulations and is a function inherent in his office. *See, Artwohl* v. *United States*, 193 Ct. Cl. 382, 434 F. 2d 1319 (1970). The Ambassador there was held within his rights to condition the sale by American diplomatic personnel in Brazil of privately-owned automobiles imported duty-free, on their agreement to surrender the "excess profits" derived from the sale to a charity of their own choosing. The Ambassador here perhaps

could have prohibited the establishment of the Association altogether, had there been no Regulation on the subject.

A perusal of the Association's constitution and by-laws reveals nothing inconsistent with the Regulations and makes it apparent that the members themselves considered it bound thereby. The members adopted a constitution which restricted membership to:

> * * * United States citizens who are not permanent residents of Iran and who by the nature of their duty assignments in Iran are permitted under agreement with the Government of Iran to import goods duty-free for themselves and their dependents. * * *.

The Board of Directors is given some discretion to act upon applications for membership not covered by the above, but all Board actions are subject to review by the Ambassador. The membership qualifications in *Donaldson* were also defined by the duty-free privilege. This indeed, seems basic, since one of the most significant functions of both facilities was to furnish American-made convenience and comfort items which Americans take so much for granted at home, and which apparently would have been quite costly were they subject to Iranian import duties. Among other uses, the Association affords a means to simplify exercise of the duty-free privilege in making minor purchases and gives the Ambassador a handle to control abuses of the kind dealt with in *Artwohl*. The Regulations reflect that the Association also is used to conserve United States foreign exchange by channeling members' personal purchases, so far as possible, to products of United States origin.

Plaintiff's reliance on the constitution and by-laws as evidence of the "voice of the membership" is simply not supported by the documents themselves. In fact, it appears that this "voice" is more like an *echo*. The members have the right to vote at annual and special meetings where they can amend the constitution. However, no amendment can be effective without the approval of the Ambassador. The business of the Association is carried on by the Board of Directors and the members have no vote on the selection of Board members. The Ambassador appoints the Chairman and the other Board members are appointed by the heads of the various Govern-

ment agencies with missions in Iran. As if that were not enough, all Board actions are subject to review by the Ambassador.

The Board is empowered to write the by-laws, wherein their own duties and responsibilities are specified. The by-laws also specify the rights and responsibilities of the Association's members. There seem to be as many responsibilities as rights. A member may "enjoy the facilities" where he may purchase "reasonable" quantities which "shall be only for the needs of the member and his family." He will be given a copy of the constitution and by-laws, and he may inspect the books and minutes of Board meetings, although other than registering a complaint, there doesn't seem to be much he can do about anything he disagrees with.

The constitution also provides that the Association may be dissolved upon the order of the Ambassador and that he will make the decision, upon recommendation of the Board, as to distribution of surplus funds.

We are sure that such is not the usual supervision exercised by Ambassadors "over any privately-owned business, operated by Americans, in a foreign land." We do not see how the Ambassador's power of control could have been any tighter, even if, as a matter of his own discretion, he allowed the members to decide many questions by themselves. These are similar to the circumstances in *Donaldson* which prompted that court to comment, at 839:

> * * *. Thus, not only the policies and management of the commissary, but its very existence, were subject to Government control and direction. * * *

In summary, we think that the United States Employees Association of Tehran is an "agency" of the Government within the meaning of §911. Plaintiff's position as an employee of the Association is no different than if he were an employee of one of the activities his counsel concedes are "recognized Government agencies"; *e.g.*, "United States Armed Forces exchanges, commissioned and non-commissioned officers' messes, Armed Forces motion picture services, and other organizations similarly organized and operated under Government regulations." *See*, Rev. Rul. 54-612, 1954-2, C.B. 169.

It is, therefore, unnecessary to consider the effect upon the controversy, if any, of the recital in plaintiff's contract, reading:

> It is understood by the Assistant General Manager that the entire amount [apparently, of a guaranteed severance fund to be paid over in case of his death or severance from employment] will be subject to the applicable United States taxes for income and F.I.C.A.

Plaintiff is not entitled ~~to~~ exclude his salary as assistant manager of ~~the~~ Association from his gross income. His motion for summary judgment is denied and his petition is dismissed. Defendant's cross motion is granted and it may recover on the counterclaim the undisputed amount of $12.97 from the plaintiff. Judgment is entered for defendant accordingly.

U.S. GOVERNMENT PRINTING OFFICE: 1971

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

* * * *

357-69 ARNOLD A. MORSE, SR., and)
HELLEN V. MORSE)

* * * *

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*, except that Judges SKELTON and NICHOLS took no part in the consideration and decision of No. 337-64.

ORDER

These cases come before the court on motions for amendment, for relief from judgment, for rehearing, to reconsider, for oral argument, and for further relief under Rules 151 and 152 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this 15th day of October, 1971, that said motions be and the same are denied as follows:

* * * *

357-69 Arnold A. Morse, Sr. and Hellen V. Morse. Plaintiff's motion for rehearing.

BY THE COURT

Chief Judge

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 911 [as amended by Sec. 11(a), Revenue Act of 1962, P.L. 87-834, 76 Stat. 960]. EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.

(a) *General Rule.*—The following items shall not be included in gross income and shall be exempt from taxation under this subtitle:

* * * *

(2) *Presence in foreign country for 17 months.*—In the case of an individual citizen

of the United States who during any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days in such period, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) which constitute earned income attributable to services performed during such 18-month period. The amount excluded under this paragraph for any taxable year shall be computed by applying the special rules contained in subsection (c).

* * *

Foreign Service Act of 1946, c. 957, 60 Stat. 999; (22 U.S.C., § 802).

SEC. 121. When used in this Act, the term

* * *

(4) "Government agency" means any executive department, board, bureau, commission, or other agency in the executive branch of the Federal Government, or any corporation wholly owned (either directly or through one or more corporations) by the United States;

* * *

No. 71-905

In the Supreme Court of the United States

OCTOBER TERM, 1971

ARNOLD A. MORSE, SR. AND HELLEN V. MORSE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
SCOTT P. CRAMPTON,
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OPINION BELOW

The opinion of the Court of Claims (Pet. App. A 1-10) is reported at 443 F.2d 1185.

JURISDICTION

The judgment of the Court of Claims was entered on June 11, 1971. Petitioner's motion for rehearing was

denied on October 15, 1971 (Pet. App. B). The petition for a writ of certiorari was filed on January 12, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the United States Employees Association of Tehran, Iran, organized under Section 921(b) of the Foreign Service Act of 1946, as amended, is an agency of the United States within the meaning of Section 911(a) of the Internal Revenue Code of 1954, so that the salary paid by the Association to petitioner,[1] as its assistant general manager, would not be excludable from his gross income.

STATUTE INVOLVED

The pertinent provisions of Section 911 of the Internal Revenue Code of 1954 are set forth in an Appendix to the petition (Pet. App. C 1-2).

STATEMENT

On August 30, 1965, petitioner entered into an employment contract with the United States Employees Association of Tehran, Iran (the "Association"), as its assistant general manager for a two-year period. The Association was organized by the American Embassy employees at Tehran, with the approval of the Ambassador, to provide its members with recreational

[1] References to "petitioner" are to Arnold A. Morse, Sr. Hellen V. Morse is a party only because she filed a joint income tax return with her husband for the taxable year in issue.

facilities and a commissary. Membership was limited to United States citizens in Iran, who are permitted, by an agreement between the United States government and Iran, to import goods duty-free for themselves and their dependents. The Association was established under the authority of State Department regulations (Foreign Affairs Manual, Vol. 6, Sec. 500 *et seq.*) issued pursuant to Section 921(b) of the Foreign Service Act of 1946, 60 Stat. 999, 1027, as amended, 22 U.S.C. 1139(b). (Pet. App. A 3.)

Under the regulations, an organization like the Association may be established only when the Ambassador decides one is needed. It is to be located, whenever feasible, on government property. The government furnishes space and equipment, and government funds are available when necessary to establish the organization. Working funds are obtained from members' deposits. The organization is required to operate under the detailed supervision of the Ambassador to make sure that it carries out its activities in accordance with the policies of the State Department. Upon liquidation, the assets of the organization, over and above membership deposits, belong to the State Department for distribution to other commissaries at other posts requiring financial assistance. The Ambassador is to see to it that all personnel are bonded, that there is adequate insurance, and that there are frequent audits. The organization is to furnish the Ambassador with monthly financial statements. (Pet. App. A 6-7.)

The constitution and by-laws of the Association are in accord with the regulations, and insure that the As-

sociation will carry on its affairs under the control and supervision of the Ambassador. Thus, the board of directors which manages the affairs of the Association is not elected by the members; instead, the Ambassador appoints the chairman of the board, and the other board members are appointed by the heads of the various government agencies with missions in Iran. All board actions are subject to review by the Ambassador. The members have the right to vote at annual and special meetings where they can amend the constitution, subject, however, to the Ambassador's approval. The constitution and by-laws further provide that the Ambassador may dissolve the Association and distribute its surplus funds. The United States is not liable for any debts of the Association, and the employees of the Association are not employees of the United States. (Pet. App. A 8-9.)

Section 911(a)(2) of the Internal Revenue Code of 1954 provides for the exclusion from gross income of amounts received from sources without the United States as earned income for services rendered by a United States citizen who is physically present in a foreign country for 510 days during any period of 18 consecutive months. Excepted from this exclusion are "amounts paid by the United States or any agency thereof." On his income tax return for 1966, petitioner claimed that the Association was not an agency of the United States and, therefore, that he was entitled to the exclusion.

The Court of Claims held on the undisputed facts that the Association is an agency of the United States, affording a means for the exercise by its members of

duty-free privileges under the control of the Ambassador, and that his control prevented abuses and conserved United States foreign exchange by channeling personal purchases of its members to products of United States origin. The court accordingly denied petitioner's motion for summary judgment and dismissed his complaint. It granted the government's cross-motion for summary judgment and its motion for judgment on a counterclaim. (Pet. App. A 8.)

ARGUMENT

The decision below is correct. There is no conflict of decisions or any other basis for further review.

Petitioner's argument that the Court of Claims incorrectly concluded that his employer is an agency of the government falls with his misstatement of the facts. He erroneously describes the Association (Pet. 4-6) as a "voluntary organization" of "cooperative consumer-patrons who have joined collectively in the organization, operation and management of a strictly commercial business enterprise," which, owning all its assets, is "independent, self-functioning," "completely self-sufficient," "operating permissively with only the barest of guidelines and review," and which "executes and controls the administration of its policies through (a) Membership meetings, (b) the Board of Directors, (c) Special Committees, and (d) The General Manager *** and other employees subject only to the review of the Ambassador."

After examining the right of control of the Ambassador over the affairs of the Association as set forth in

the statute, the regulations, and in its constitution and by-laws, the Court of Claims concluded (Pet. App. A 9):

> We are sure that such is not the usual supervision exercised by Ambassadors "over any privately-owned business, operated by Americans, in a foreign land." We do not see how the Ambassador's power of control could have been any tighter, even if, as a matter of his own discretion, he allowed the members to decide many questions by themselves.

Furthermore, in contrast to petitioner's allegations that the Association was a "strictly commercial business enterprise" (Pet. 4), the Court of Claims pointed out that the Association serves and promotes the interests of the United States government by enabling the Ambassador to control the exercise of the duty-free privilege, (see *Artwohl* v. *United States*, 193 Ct. Cl. 382, 434 F. 2d 1319), and also by conserving United States foreign exchange, and thus aiding our balance-of-payments position.

In view of these facts, the cases cited by petitioner (Pet. 6) for his assertion that the court below applied an erroneous definition of the term agency of the United States, as used in Section 911(a)(2), are not in point. There is no confusion requiring clarification by this Court. On the contrary, the decision below is in accord with the three other applicable decisions on this question. *Standard Oil* v. *Johnson*, 316 U.S. 481; *Donaldson* v. *Commissioner*, 51 T.C. 830; and *Raffensperger* v. *Commissioner*, 33 T.C. 1097. *Standard Oil*

held that a regulated military post exchange was an agency of the United States constitutionally exempt from state taxation. *Donaldson* held that a regulated Foreign Service Act commissary in Karachi, Pakistan, was an agency of the United States under Section 911 of the 1954 Code, and the same result was reached earlier in *Raffensperger* with respect to a regulated military officers' club.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The United States in its opposing brief in No. 905 relies on three cases - *Standard Oil v. Johnson*, 316 U.S. 481 (1942); *Donaldson v. Commissioner*, 51 T.C. 830 (1969); and *Raffensperger v. Commissioner*, 33 T.C. 1097 (1960), each of which requires specific comment in response.

REBUTTAL

First, the *Standard Oil* case, a decision of this Court, is factually distinguishable and on careful reading supports petitioners' contention for exemption on the basis of lack of control and supervision by the Government over the activities of petitioners' employer. In the *Standard Oil* case, the late Justice Black, in speaking for the Court, clearly delineated the specific control and supervision actually exercised by the commanding officer of the Army post over the daily affairs and activities of the post exchange. It is this specific lack of control and supervision by the Government which petitioners urge is significantly lacking and distinguishes their case from *Standard Oil*.

Unfortunately, omissions from the *Standard Oil* case quoted in part in the decision by the Court of Claims (Pet. App. A-5, A-6) are particularly misleading as concerns the extent of the control and supervision exercised by the commanding officer. In order to clarify any possible misconception and to get a clearer understanding of petitioners' argument, two entire paragraphs of the *Standard Oil Co. v. Johnson*, 316 U.S. 481, decision at Pages 484-485 are quoted:

> "The commanding officer of an Army Post, subject to the regulations and the commands of his own superior officers, has complete authority to establish and maintain an exchange. *He details a post exchange officer to manage its affairs. This officer and the commanding officers of the various company units make up a council which supervises exchange activities. None of these officers receives any compensation other than his regular salary.* The object of the exchanges

is to provide convenient and reliable sources where soldiers can obtain their ordinary needs at the lowest possible prices. *Soldiers, their families, and civilians employed on military posts here and abroad can buy at exchanges. The Government assumes none of the financial obligations of the exchange. But* government officers, under government regulations, handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing its membership. Profits, if any, do not go to individuals. They are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops.

From all of this, we conclude that post exchanges as now operated are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes. In concluding otherwise, the Supreme Court of California was in error." (Emphasis added)

Comparing the typical Army post exchange of pre-Pearl Harbor days of 1940 - 1941 with the supermarket operations of petitioners' employer some twenty-five years later, a business with projected annual sales of more than five and one-quarter million dollars, is fallacious. The one cannot be equated with the other nor can the decision of this Court in *Standard Oil* be properly extended to include petitioners' factual situation.

Second, the *Donaldson* case, a decision of the Tax Court wherein the claimant prosecuted his case *pro se*, factually represents material differences in control and supervision. Presumably, because of the modest sum of the refund sought, claimant in that case concluded that a full review on appeal to the United States Court of Appeals with professional counsel was financially impractical. That decision, not having been fully prosecuted, cannot fairly be cited as prevailing precedent in an area of law as important as is this regarding the definition of a "government agency."

Third, the *Raffensperger* case, also a decision of the Tax Court wherein the amount of the refund sought was modest compared to the cost of litigation thereby limiting further expenditure of legal fees and costs on appeal, again deals with a factual situation vastly dissimilar from that in the instant petition. This decision, having limited application, is inappropriate as precedent for the definition of a "government agency."

ARGUMENT

Respondent's contention rests exclusively on the determination made by the court below as to the definition of an "agency of the United States", a decision petitioners submit is predicated on faulty premises of fact resulting in erroneous conclusions of law.

This definition of an "agency of the United States," if allowed to stand, is so general as to include practically any extension of a loosely-knit and semi-official function, a decision the Government may come to regret. With the current broad influence and extensive dependence on Government in wide areas of social, economic, commercial,

cultural and political contacts with the public, including numerous forms of direct aid; grants; exclusive contracts where Government-owned facilities, property, equipment, technical assistance and inspection capabilities are made available to private entrepreneurs; financial assistance; various forms of insurance and subsidies of all kinds; all more or less subject to general guidelines in published regulations and federal statutes, require a more precise definition of an "agency of the United States" than has been judicially made to date.

Contrary to the contentions of the respondent (Brief in Opp. Page 5), the decision of the court below compounds the disarray and lack of uniformity of application of a Federal tax statute and discriminates unfairly against a substantial segment of the tax-paying public. As a result, uncertainty and confusion exist among large numbers of comparably-situated taxpayers, the vast majority of whom are unable to pursue their causes effectively against the power and unlimited resources of Internal Revenue Service and the Federal Government.

CONCLUSION

For the foregoing reasons as well as those which have been urged in the petition, certiorari should be granted.

Respectfully submitted,

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